

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

CATHERINE MCKOY, MARKUS FRAZIER, and
LYNN CHADWICK, individually and on behalf of all
others similarly situated,

Plaintiffs,

v.

THE TRUMP CORPORATION, DONALD J. TRUMP,
in his personal capacity, DONALD TRUMP, JR., ERIC
TRUMP, and IVANKA TRUMP,

Defendants.

No. 1:18-cv-09936-LGS-SLC

**DECLARATION OF MATTHEW D. BRINCKERHOFF IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

MATTHEW D. BRINCKERHOFF, declares under penalty of perjury pursuant to 28 U.S.C. § 1746, that the following is true and correct:

1. My name is Matthew D. Brinckerhoff. I am a partner in the firm of Emery Celli Brinckerhoff Abady Ward & Maazel LLP, counsel for Plaintiffs Catherine McKoy, Markus Frazier, and Lynn Chadwick ("Plaintiffs"). I submit this declaration in support of Plaintiffs' Motion for Class Certification.

2. Annexed as **Exhibit 1** is a true and accurate copy of excerpts from the transcript of the August 18, 2022 deposition of David Merriman, who testified on behalf of non-party ACN Opportunity, LLC ("ACN") as its designee pursuant to Fed. R. Civ. P. 30(b)(6).

3. Annexed as **Exhibit 2** is a true and accurate copy of a spreadsheet documenting ACN Independent Business Owner ("IBO") sign-ups from 2012 to 2016.

4. Annexed as **Exhibit 3** is a true and accurate copy of excerpts of the November 18, 2022 Expert Report of Michael Gartenberg.

5. Annexed as **Exhibit 4** [reserved].
6. Annexed as **Exhibit 5** is a true and accurate copy of a February 6, 2006 Trump Organization memorandum from Cathy Glosser enclosing the February 6, 2006 Endorsement Agreement between Donald Trump and ACN.
7. Annexed as **Exhibit 6** is a true and accurate copy of a February 15, 2006 email from Robert Stevanovski at ACN.
8. Annexed as **Exhibit 7** is a true and accurate copy of the February 2008 Endorsement Agreement between Donald Trump and ACN.
9. Annexed as **Exhibit 8** is a true and accurate copy of the January 28, 2009 Appearance and Endorsement Agreement between Donald Trump and ACN.
10. Annexed as **Exhibit 9** is a true and accurate copy of the January 14, 2011 Appearance and Endorsement Agreement between Donald Trump and ACN.
11. Annexed as **Exhibit 10** is a true and accurate copy of the February 13, 2013 Appearance Agreement between Donald Trump and ACN.
12. Annexed as **Exhibit 11** is a true and accurate copy of an October 30, 2015 email from Rhona Graff at The Trump Organization attaching the Mutual Termination of Appearance Agreement executed by Donald Trump and ACN on June 20, 2015.
13. Annexed as **Exhibit 12** is a true and accurate copy of a November 17, 2008 email from Sheila Marcello at ACN attaching an ACN document titled, “24 HOUR GAME PLAN.”
14. Annexed as **Exhibit 13** is a true and accurate copy of excerpts of the November 18, 2022 Expert Report of Stacie Bosley.

15. Annexed as **Exhibit 14** is a true and accurate copy of a December 11, 2012 email from Sheila Marcello at ACN and accompanying attachments, including ACN documents titled: “Road Map to LEXUS,” “IBO Getting Started Process,” and “Presenting the Opportunity.”

16. Annexed as **Exhibit 15** is a true and accurate copy of ACN Opportunity Disc, Version 4.0, June 2010.

17. Annexed as **Exhibit 16** is a true and accurate copy of excerpts of the August 2011 issue of *Success from Home* magazine.

18. Annexed as **Exhibit 17** is a true and accurate copy of ACN Opportunity Disc Version 5.3, December 2011.

19. Annexed as **Exhibit 18** is a true and accurate copy of ACN Opportunity Disc Version 5.5, May 2012.

20. Annexed as **Exhibit 19** is a true and accurate copy of ACN Opportunity Disc Version 5.6, June 2012.

21. Annexed as **Exhibit 20** is a true and accurate copy of ACN Opportunity Disc Version 6.1, September 2012.

22. Annexed as **Exhibit 21** is a true and accurate copy of ACN Opportunity Disc Version 7.0, January 2013.

23. Annexed as **Exhibit 22** is a true and accurate copy of ACN Opportunity Disc Version 9.2, June 2015.

24. Annexed as **Exhibit 23** is a true and accurate copy of excerpts of the November 18, 2022 Expert Report of Kevin Lane Keller.

25. Annexed as **Exhibit 24** is a true and accurate copy of an ACN promotional video featuring Donald Trump.


26. Annexed as **Exhibit 25** is [reserved].
27. Annexed as **Exhibit 26** is a true and accurate copy of an ACN promotional video featuring Donald Trump.
28. Annexed as **Exhibit 27** is a true and accurate copy of excerpts from the transcript of the October 11, 2022 deposition of Donald J. Trump.
29. Annexed as **Exhibit 28** is a true and accurate copy of ACN's 2012 Policies and Procedures.
30. Annexed as **Exhibit 29** is a true and accurate copy of an October 25, 2006 email from Robert Stevanovski at ACN.
31. Annexed as **Exhibit 30** is a true and accurate copy of excerpts of the September 2014 issue of *Success from Home* magazine.
32. Annexed as **Exhibit 31** is a true and accurate copy of excerpts of the August/September 2008 issue of *Success* magazine.
33. Annexed as **Exhibit 32** is a true and accurate copy of excerpts of the August 2010 issue of *Success from Home* magazine.
34. Annexed as **Exhibit 33** is a true and accurate copy of an internal ACN financial analysis titled "ACN Consolidated Summary."
35. Annexed as **Exhibit 34** is a true and accurate copy of a March 26, 2010 letter from Brian L. Davis of McColl Partners to ACN Chairman Robert Stevanovski enclosing a document titled "Confidential Information Memorandum," and excerpts of the same memorandum.
36. Annexed as **Exhibit 35** is a true and accurate copy of excerpts from the transcript of the August 23, 2022 deposition of Anne Archer Butcher.

37. Annexed as **Exhibit 36** is a true and accurate copy of the March 2009 episode of *The Celebrity Apprentice* featuring ACN.

38. Annexed as **Exhibit 37** is a true and accurate copy of the March 2011 episode of *The Celebrity Apprentice* featuring ACN

39. Documents produced by non-party ACN in this case include lengthy spreadsheets listing thousands of ACN Independent Business Owners (“IBOs”) at particular points in time and their ACN earnings, if any. One such spreadsheet is over 700 pages long and lists 65,535 IBOs and “raw data” detailing their earnings, if any. Given the length of the spreadsheet, it is not attached as an exhibit here. Plaintiffs can supplement the record and provide a copy of the complete spreadsheet containing the raw IBO enrollment data to the Court, if needed.

Dated: March 10, 2023



MATTHEW D. BRINCKERHOFF

EXHIBIT 13

McKoy, et al., v. The Trump Corporation, et al., Case No. 1:18-cv-09936 (S.D.N.Y.)

Expert Report of Stacie Bosley

November 18, 2022

Confidential – Subject to Protective Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CATHERINE MCKOY, MARKUS FRAZIER,
and LYNN CHADWICK, individually and on
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THE TRUMP CORPORATION, DONALD J.
TRUMP, in his personal capacity, DONALD
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EXPERT REPORT OF STACIE BOSLEY

November 18, 2022

E. Summary of Opinions

12. The Compensation Plans do not describe a business opportunity with a reasonable prospect of economic success with low risk because they do not provide meaningful opportunities to earn money through either of their primary mechanisms of retail activity or recruiting. Commission percentages on retail activity are so low that at average levels of monthly ACN product or service purchases per IBO, the typical IBO would earn commissions of less than \$3 per month. Similarly, bonuses and commissions for recruitment are also either low or zero at low levels of recruitment. Although recruitment rewards are higher at higher levels of recruitment, these bonus and commission amounts are not relevant for most IBOs because on average, it takes 20 months to recruit one additional person; therefore, the typical IBO will never reach these higher levels of recruitment, nor the rewards associated with them.

13. In addition to the Compensation Plans not providing opportunities for typical IBOs to earn money, ACN also implicitly encourages IBOs to spend money. IBOs must spend hundreds of dollars on membership and renewal fees in order to participate in ACN. They are also encouraged to purchase ACN products, to purchase ACN marketing materials, and to attend ACN events. Incurring such expenses in pursuit of retail activity and recruitment further erodes any opportunity to profit through ACN. As I discuss in subsequent sections of this report, most IBOs lose money in ACN.

14. The lack of opportunity to profit through ACN is obscured by the complexity and articulation of the Compensation Plans. The Compensation Plans contain a large amount of detail, where the details are described using confusing terminology. The specifics governing the mechanisms for earning money vary by title, product type, and points accumulation, and change

2010. As shown in Exhibit III.B.11, of the 29,097 U.S. IBOs in January 2010, 22,671 (77.9%) earned exactly \$0 in revenues.¹¹⁸

iii) IBO Net Revenue

87. As shown in Exhibit III.B.12, based on the average monthly revenues for U.S. IBOs outside of the Top Bin and deducting the ACN membership fees and personal product/service expenses, I estimate that the typical U.S. IBO lost \$51 on average in each month over the period January 2012 through August 2016. Exhibit III.B.12 also shows that when further deducting the average amount paid to ACN for marketing expenses per U.S. IBO, I estimate that the typical U.S. IBO lost \$73 on average in each month over the same period. These results are consistent with Figure III.B.1 above, which shows the number of IBOs per net revenue bin. In the figure, each net revenue bin is calculated as the actual revenue earned by each IBO for the month of January 2010 less the \$107 in monthly expenses that I estimate above.¹¹⁹ The figure shows that nearly all IBOs lost money in January 2010.

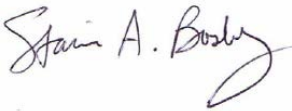
88. These estimates likely understate the typical U.S. IBO monthly loss because, as discussed above, (1) the monthly expected revenue estimate is above the median global IBO monthly revenue and (2) the monthly expected expenses estimate above likely understates the typical monthly expenses incurred by U.S. IBOs.

¹¹⁸ As discussed in Section II.A above, ACN did not issue payments to IBOs unless their total commission after subtracting the processing fee was greater than \$10. For this reason, the \$0 revenue bin may include IBOs who earned between \$0 and \$10 but were not paid.

¹¹⁹ Calculated as $\$43.20 + \$40 + \$22.41 = \106.62 . I use the Amortized Membership Fees and Average Marketing Spend per IBO from January 2012, as it is the closest month to January 2010 in which expense data are available.

C. Conclusion Regarding Historical IBO Compensation Outcomes

89. To summarize, over the typical IBO's 15-month ACN lifespan from 2012 through 2016, they spent on average between \$548 (\$399 + \$149) and \$648 (\$499 + \$149) on ACN membership and renewal fees, \$600 (\$40 × 15) on ACN product and service purchases, and \$330 (\$22 × 15) on ACN marketing expenses, for a total average expenditure of between \$1,478 and \$1,578. To offset this expenditure, the typical ACN U.S. IBO made only about \$32 per month on average in revenue, or \$480 over their ACN lifespan. Thus, the typical U.S. IBO lost between \$998 and \$1,098 on average throughout their ACN lifespan, which is consistent with my conclusion above that the Compensation Plans do not describe a business opportunity with a reasonable prospect of economic success with low risk.¹²⁰



Stacie Bosley
November 18, 2022

¹²⁰ Additionally, if I consider the median earnings to be representative of the typical IBO, I would expect these losses to be even greater, as the expected median revenues are less than the expected average revenues, as discussed above.

Exhibit II.A.2
New IBOs per Existing IBO
January 2012 - December 2016

Date	New IBOs	Renewals	Drops	Starting Count	Ending Count	New IBOs per Existing IBO
[A]	[B]	[C]	[D]	[E]	[F]	[G] = [B] / [E]
January 2012	6,568	2,651	6,141	-	96,427	-
February 2012	6,984	2,682	5,371	96,427	97,613	0.07
March 2012	7,988	2,931	8,254	97,613	95,734	0.08
April 2012	6,455	2,180	4,999	95,734	97,456	0.07
May 2012	5,872	1,926	4,162	97,456	97,710	0.06
June 2012	6,790	1,806	3,672	97,710	99,118	0.07
July 2012	6,206	2,104	5,690	99,118	96,516	0.06
August 2012	5,375	1,928	5,904	96,516	95,471	0.06
September 2012	3,929	1,907	6,218	95,471	93,711	0.04
October 2012	6,832	2,006	5,982	93,711	96,850	0.07
November 2012	4,987	1,600	6,382	96,850	94,605	0.05
December 2012	4,910	1,661	6,371	94,605	94,539	0.05
January 2013	6,696	2,548	6,365	94,539	94,870	0.07
February 2013	6,450	2,425	6,796	94,870	94,524	0.07
March 2013	7,945	2,729	8,374	94,524	94,095	0.08
April 2013	6,328	2,149	6,627	94,095	93,796	0.07
May 2013	5,966	2,020	5,849	93,796	93,913	0.06
June 2013	5,459	2,320	6,320	93,913	93,052	0.06
July 2013	6,920	2,329	6,345	93,052	93,627	0.07
August 2013	6,323	2,014	5,503	93,627	94,447	0.07
September 2013	6,547	1,889	4,414	94,447	96,580	0.07
October 2013	6,598	2,064	6,778	96,580	96,400	0.07
November 2013	5,297	1,560	5,306	96,400	96,391	0.05
December 2013	4,961	1,733	4,876	96,391	96,476	0.05
January 2014	6,958	2,429	7,010	96,476	96,424	0.07
February 2014	6,467	2,378	6,499	96,424	96,392	0.07
March 2014	8,019	2,609	8,215	96,392	96,196	0.08
April 2014	6,259	2,179	6,548	96,196	95,907	0.07
May 2014	5,706	1,813	6,201	95,907	95,412	0.06
June 2014	4,737	1,883	5,667	95,412	94,482	0.05
July 2014	5,328	2,085	7,310	94,482	92,500	0.06
August 2014	4,640	1,848	6,551	92,500	90,589	0.05
September 2014	5,432	1,979	6,619	90,589	89,402	0.06
October 2014	4,923	1,939	6,594	89,402	87,731	0.06
November 2014	3,293	1,595	5,694	87,731	85,330	0.04

Exhibit II.A.2
New IBOs per Existing IBO
January 2012 - December 2016

Date	New IBOs	Renewals	Drops	Starting Count	Ending Count	New IBOs per Existing IBO
[A]	[B]	[C]	[D]	[E]	[F]	[G] = [B] / [E]
December 2014	3,916	1,825	5,158	85,330	84,088	0.05
January 2015	4,013	2,456	6,867	84,088	90,058	0.05
February 2015	4,358	2,371	6,387	90,058	88,029	0.05
March 2015	4,962	2,577	8,078	88,029	84,913	0.06
April 2015	4,281	2,086	6,341	84,913	82,853	0.05
May 2015	3,074	1,696	5,599	82,853	80,328	0.04
June 2015	3,243	1,872	5,143	80,328	78,428	0.04
July 2015	4,581	2,016	5,372	78,428	77,637	0.06
August 2015	3,708	1,863	4,781	77,637	76,564	0.05
September 2015	2,885	1,851	5,819	76,564	73,630	0.04
October 2015	2,869	1,983	5,037	73,630	71,462	0.04
November 2015	2,041	1,376	3,739	71,462	69,764	0.03
December 2015	2,363	1,517	4,429	69,764	67,698	0.03
January 2016	2,250	2,010	4,522	67,698	67,259	0.03
February 2016	2,877	2,141	4,536	67,259	65,600	0.04
March 2016	3,126	2,183	5,589	65,600	63,137	0.05
April 2016	1,836	1,614	4,965	63,137	60,008	0.03
May 2016	1,764	1,421	3,447	60,008	58,325	0.03
June 2016	1,518	1,464	3,762	58,325	56,081	0.03
July 2016	2,229	1,729	4,893	56,081	53,417	0.04
August 2016	2,211	1,485	4,053	53,417	51,575	0.04
September 2016	2,414	1,486	3,691	51,575	50,298	0.05
October 2016	1,820	1,389	3,453	50,298	48,665	0.04
November 2016	1,224	1,127	2,492	48,665	47,397	0.03
December 2016	1,938	1,235	2,884	47,397	46,451	0.04

Notes:

[1] The “Starting Count” in each month is assumed to be the “Ending Count” from the previous month.

[2] “New IBOs per Existing IBO” is calculated as the number of new IBOs in a month divided by the starting number of IBOs in that month. The average number of new IBOs per IBO is 0.05.

[3] There were 267,685 new U.S. IBOs over the period February 2012 to August 2016. Combined with the 96,427 U.S. IBOs in January 2012, this results in 364,112 total U.S. IBOs over the period.

Source:

[1] ACN000685.